

STATE OF NORTH DAKOTA
COMMISSIONER OF AGRICULTURE

IN THE MATTER OF:

Everett Kehm

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**RECOMMENDED
FINDINGS OF FACT,
CONCLUSIONS OF LAW,
AND ORDER**

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In December 1999, a Complaint was filed with the Commissioner of Agriculture by Jeff Weispfenning, Deputy Commissioner of Agriculture requesting imposition of a civil penalty against Everett Kehm under N.D.C.C. § 4-35-23. The Complaint cites as grounds for imposition of a civil penalty, violations of N.D.C.C. § 4-35-15(2), (3), (5), and (6). Specifically, the Complaint alleges that Kehm violated the above provisions of law by “using the miticide/insecticide ‘Taktic’, which contains ‘Amitraz’, in his hives” on specific apiary locations in Ward County.

On December 28, 1999, Kehm filed an Answer to the Complaint. In his Answer Kehm questions the Department of Agriculture’s authority to bring a complaint against him. He denies being a certified pesticide applicator (the Complaint agrees in that regard). He denies violating N.D.C.C. § 4-35-15. He questions the Commissioner’s authority to assess civil penalties against him. He asserts that “Taktic EC” is not a restricted use pesticide and asserts an exemption under N.D.C.C. § 4-35-19. He also asserts that there is no verified report of damages as required by N.D.C.C. § 4-35-21.2. However, at the hearing and in his brief, Kehm seems to abandon all of the assertions of his Answer. When Kehm filed his Answer he was not represented by an attorney but he was represented by an attorney at the hearing and subsequently.

On August 8, 2000, the Department of Agriculture requested the designation of an administrative law judge (ALJ) from the Office of Administrative Hearings to conduct a hearing and to issue recommended findings of fact and conclusions of law, as well as a recommended order, in regard to the Complaint. On August 11, 2000, ALJ Allen C. Hoberg was designated.

On August 15, 2000, the ALJ issued a Notice of Hearing. The hearing was held as scheduled on September 20, 2000, at the Office of Administrative Hearings, 1707 North 9th Street, Bismarck, North Dakota. The Department was represented at the hearing by Assistant Attorney General Charles M. Carvell of Bismarck. The Respondent was present at the hearing. He was represented at the hearing by Attorney Michael Ward of Minot. At the hearing, the Department called Consumer Protection Inspector Doug Johnston as a witness. Kehm testified and called Harold Knoefler as a witness. Seventeen exhibits were offered and admitted. Exhibits 1-14 were offered by the Department; exhibits 15-17 were offered by Kehm.

At the close of the hearing, the ALJ heard oral argument from both the Department and Kehm. However, Mr. Carvell said that the Department may wish to file a post-hearing brief. Mr. Carvell did file the "Dep't of Agriculture Post-Hearing Brief" on September 28, 2000. Mr. Ward filed Kehm's "Department of Agriculture Post-Hearing Brief" on October 5, 2000.

Based on the evidence presented at the hearing, as well as on the oral argument and briefs of the parties, the administrative law judge makes the following recommended findings of fact and conclusions of law.

FINDINGS OF FACT

1. Kehm is a North Dakota beekeeper who locates numerous hives of bees on various apiary locations in the state. During the 1999 beekeeping season, he located hives of bees in Ward County.

2. On June 6, 1999, inspection of Kehm's bees located in the NE ¼ of Section 35-156-86 of Ward County, North Dakota, by Consumer Protection Inspectors Allen Aufforth and Doug Johnston of the Apiary Division of the Department of Agriculture revealed that Kehm used the miticide/insecticide "Taktic" which contains "Amitraz" in numerous hives at that location. See exhibits 1-10 (photographs). Kehm placed cardboard strips containing Taktic in the hives.

3. Johnston and Aufforth found many cardboard strips in Kehm's hives but removed only two cardboard strips from two hives found at Kehm's Ward County apiary location. The two strips were subsequently analyzed by the North Dakota Department of Health. See exhibits 13 and 14. The two strips were each found to contain a "fair amount" of Amitraz. Exhibit 14.

4. The inspection and testing of Kehm's bees for Amitraz by the Department of Agriculture and the Department of Health was in accordance with standard Department of Agriculture and Department of Health procedures.

5. Johnston completed a Pesticide Use Investigation Report on Kehm on June 18, 1999. Exhibit 11. During the time Johnston was completing the report, Kehm admitted to Johnston that he used Taktic to control mites on bees in his hives. However, Kehm refused to sign the investigation report completed by Johnston. At the hearing, too, Kehm admitted using Taktic to control mites in his hives. Kehm said that he knows Taktic contains Amitraz. He admitted to using Amitraz for from 10-15 years on bees in his hives, though he said that he did not use it on all of his hives in North Dakota in 1999. Again, Kehm had numerous hives at the Ward County location (see exhibits 1-10) and had numerous hives at other locations. Although there is no evidence to show specifically how many Taktic strips Kehm used to control mites at specifically how many hives or at specifically how many locations in North Dakota, it may be inferred from the evidence and Kehm's admissions that Kehm placed Taktic strips on more than

just two hives in one apiary location. But, at the least, Kehm did place Taktic strips on two hives in one apiary location. During his investigation, Johnston also discovered a can of “Taktic” that Kehm acknowledged using. However, after Johnston started to fill out his investigation report, Kehm would not let Johnston keep the can for his investigation.

6. The evidence shows that Kehm is likely not the only North Dakota beekeeper to use Amitraz in his hives to control mites on his bees. Harold Knoefler, a retired beekeeper, who had spent sixty years in the beekeeping business, testified that Amitraz has been in use over many years by beekeepers in North Dakota and elsewhere to control mites on bees. He said that beekeepers consider Amitraz as a general remedy for mites. However, Johnston said that he believes that Amitraz is not currently, commonly used on bees in North Dakota. He said that he knows of no one who uses it. The evidence is not conclusive about whether Amitraz is commonly used by beekeepers on bees kept in North Dakota. However, it appears that if it is commonly used, those beekeepers who use it do not wish to have their use of it made known. Knoefler said that, as far as he is aware, Amitraz is never applied to the honey supers, only to the brood chambers, and usually in the spring. Thus, he said use of Amitraz does not contaminate the honey produced by the bees. He said honey is never extracted from the brood chamber.

7. Kehm had some of his honey tested for Amitraz. See exhibit 17. No Amitraz was found in the honey tested. *Id.*

8. Although Knoefler said that he knew of beekeepers who used Amitraz on their bees in North Dakota, on cross-examination he declined to give any names. He said that his knowledge about the use of Amitraz is general knowledge, not particular.

9. The Taktic label says that it is “for the control of ticks, mange mites and lice on beef cattle, dairy cattle and swine.” Exhibit 12 (recent label); see exhibit 15 (1993 label).

Neither Taktic label in evidence in this matter says anywhere that it is for the control of mites on bees. On the 1993 label that Kehm supplied at the hearing, the label has a section entitled “**DIRECTIONS FOR USE**” which in turn has two subsections. One is captioned “**BEEF AND DAIRY CATTLE**” and the other “**SWINE.**” The “**DIRECTIONS FOR USE**” section does not have a subsection for bees or beehives or honey; in fact, it says nothing about these. Furthermore, the “**DIRECTIONS FOR USE**” section provides detailed instructions. It specifically names the bugs Taktic will control. It explains what concentration to use. It provides instructions for application. It gives the period of effectiveness. There is nothing in the “**DIRECTIONS FOR USE**” for applying Taktic to bees, beehives, or honey.

10. Taktic contains 12.5% Amitraz, its active ingredient.

11. Taktic is toxic to fish and aquatic invertebrates. Exhibits 12 and 15. However, considering current evidence, Amitraz is not likely to be a human carcinogen, and it is apparently not a hazard to workers or consumers with normal exposure. Exhibit 16. However, there may be some harmful effects to humans, *e.g.*, it is harmful if swallowed, inhaled or absorbed through the skin. Exhibits 12 and 15.

12. Taktic is not a restricted use pesticide. It may be purchased over the counter by anyone.

13. There was no evidence presented at the hearing that Amitraz should not be used for the control of mites on bees, *i.e.*, that it is in some way dangerous or harmful to do so.

14. Kehm has not previously violated any pesticide laws in the State of North Dakota.

CONCLUSIONS OF LAW

1. N.D.C.C. § 4-35-15 states, in part, as follows:

Unlawful acts - Grounds for denial, suspension, or revocation of a certification. The commissioner may, after opportunity for a hearing, deny, suspend, revoke, or modify any provision of any certification issued under this chapter, if the commissioner finds that the applicant or the holder of a certification has committed any of the acts enumerated in this section. Each of the following acts is a violation of this chapter, whether committed by an applicant, holder of certification, or any other person applying or using pesticides, if the person:

2. Made a pesticide recommendation, application, or use inconsistent with the labeling or other restrictions prescribed by the board.

3. Applied materials known by that person to be ineffective or improper.

5. Operated in a faulty, careless, or negligent manner.

6. Neglected, or, after notice, refused to comply with the provisions of this chapter, the rules adopted hereunder, or of any lawful order of the commissioner.

(Emphasis supplied.)

2. N.D.C.C. § 4-35-23 states, in part, as follows:

4-35-23. Penalties.

4. In addition to the criminal sanctions which may be imposed pursuant to subsections 1 and 2, a person found guilty of violating this chapter or the rules adopted under this chapter is subject to a civil penalty not to exceed five thousand dollars for each violation. The civil penalty may be imposed by a court in a civil proceeding or by the commissioner of agriculture through an administrative hearing pursuant to chapter 28-32.

(Emphasis supplied.)

3. If a violation of N.D.C.C. ch. 4-35 is proven at a hearing, the Commissioner of Agriculture has authority to impose a civil penalty of up to five thousand dollars against Kehm

for each violation of making a pesticide use inconsistent with the pesticide label. Although Kehm likely used Taktic on more than two bee hives in 1999, the Department only tested cardboard strips from two of Kehm's hives and found them to contain Amitraz, the active pesticide ingredient in Taktic. Thus, if Kehm using Taktic on one of his hives is a violation of N.D.C.C. § 4-35-15(2), the Commissioner could impose up to a \$10,000 civil penalty against Kehm, \$5,000 for each violation, *i.e.*, \$5,000 for using Taktic on each of the two hives. The Complaint requests imposition of a \$10,000 civil penalty against Kehm.

4. The Commissioner has jurisdiction over Kehm and any application of a pesticide by him in North Dakota that violates the provisions of N.D.C.C. ch. 4-35.

5. Use of Taktic by Kehm on his bee hives in 1999 to control mites (or use of Taktic on his bee hives for any other purpose, for that matter) is a use inconsistent with the Taktic label, and thus a violation of N.D.C.C. § 4-35-15(2).

6. The law and common sense lead to the conclusion that Kehm's use of Taktic is a use inconsistent with the Taktic label. See cases cited by the Department in its post-hearing brief, at 1-3. Kehm's argument that because the Taktic label does not specifically forbid the use of Taktic for the control of mites such use is, therefore, a use consistent with the label, or, at least, it is a use that is not prohibited, is rejected. It is true that the use of Taktic for control of mites on bees is not specifically allowed or prohibited under the Taktic label. However, it is because such use is not specifically allowed that it is a use inconsistent with the label, and, thus, a violation of N.D.C.C. § 4-35-15(2). Under the law, if a use for a pesticide is not specifically allowed or permitted, it is prohibited. (N.D.C.C. § 4-35-15(2) is the same as that in FIFRA, 7 U.S.C. § 136j(a)(2)(G).) The Taktic label specifically indicates allowed or permitted uses. No other uses are permitted; *i.e.*, other uses are prohibited. The use of Taktic for control of mites on

bees in North Dakota is not permitted. The use of Taktic for control of mites on bees in North Dakota is a use inconsistent with the label; it is a prohibited use.

7. The law does not require that Kehm intended to engage in a use of Taktic inconsistent with the label. But, if the law did require intent, Kehm's intent may be inferred from the fact that he had a long-standing practice of using Amitraz to control mites on his bees, he had seen the Taktic label many times, he knew Taktic contained Amitraz, he knew that the Taktic label did not indicate on it that the pesticide could be used for control of mites on bees, and he intended to use Amitraz for the control of mites on his bees in 1999.

8. Barring an abuse of discretion, the law allows the Commissioner of Agriculture considerable discretion under N.D.C.C. § 4-35-23(4) to impose a civility penalty within the range of allowable amounts of civil penalty that may be imposed, for proven violations of N.D.C.C. § 4-35-15. *See Matter of Prettyman*, 410 N.W.2d 533 (N.D. 1987). (In *Prettyman*, a beekeeper received the maximum civil penalty under N.D.C.C. § 4-12.2-22, \$5,000, because by his actions he subjected the bees, equipment, and livelihoods of other beekeepers in North Dakota to great risk in clear violation of North Dakota law; *i.e.*, his actions threatened, potentially, the whole beekeeping industry.)

9. The provisions of N.D.C.C. § 4-35-19 do not apply as an exemption in this matter. This section primarily sets forth exemptions for the certification requirements of N.D.C.C. ch. 4-35.

10. N.D.C.C. § 4-35-22.2 does not apply in this matter, either.

RECOMMENDED ORDER

The greater weight of the evidence shows that Kehm twice violated the provisions of N.D.C.C. § 4-35-15 (2). As a result of the two proven violations, the Department recommends a \$10,000 civil penalty, \$5,000 for each violation. This is the maximum civil penalty for such violations. It is true, however, that Kehm used Amitraz on more than just two hives. He admitted as much. Further, by imposing on Kehm the maximum penalty for the two violations, the Department may wish to make an example of Kehm, to discourage the use of Amitraz by other beekeepers. However, although the Commissioner may have previously imposed the maximum civil penalty in other pesticide violation matters, the ALJ is not aware that he has done so. The ALJ does not recall that maximum civil penalty has been imposed in any pesticide administrative action in which he has presided. Yet, the Commissioner has discretion to impose the maximum civil penalty in this matter, barring an abuse of discretion. Under the circumstances of this matter, however, the ALJ does not recommend that the Commissioner impose the maximum penalty; perhaps a lesser penalty is appropriate. In this matter, there was no showing of severe, actual or potential damage to the bee hives of Kehm or to his honey, or to the bee hives or honey of others, or to any other property interest or other interest. This is Kehm's first violation of the pesticide laws. Therefore, although the ALJ does not specifically recommend an amount of civil penalty to be imposed, he does recommend the imposition of a civil penalty in an amount less than \$10,000.00, in an amount that will not be too severe, but that will still set an example to discourage the use of Amitraz by other beekeepers, if that is the Department's intent.

Dated at Bismarck, North Dakota, this 10th day of October, 2000.

State of North Dakota
Commissioner of Agriculture
Roger Johnson

By: _____
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Administrative Law Judge
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